BANK BUMIPUTRA (M) BHD.

v.

GALIAN SAHAM SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 23-531-87]
10 MAY 1989

CIVIL PROCEDURE: *Order 14 summary judgment - Appeal - 2nd defendant chargor as well as guarantor - Whether liability was limited to 60% of the overdraft facility - Whether plaintiff was guilty of any breach of duty of care.*

The plaintiff took out an O. 14 application against the 2nd defendant and succeeded in obtaining final judgment. The 2nd defendant appealed to the Judge.

The plaintiff lent money to the 1st defendant. The 2nd defendant executed a charge and guarantee in respect of the money lent. The defendant raised 2 points. The first point was whether the liability was limited to RM39,600. The second point was that the plaintiff owed a duty of care to a guarantor and chargor.

Held:
[1] That liability was not limited to RM39,600.

[2] The duty of care owed by a chargee towards a chargor is to make it as far as possible, for the chargor to repay as little as possible or to have as much as possible any surplus after sale of charged land.

[Appeal dismissed with costs.]

Cases referred to:
Standard Chartered Bank v. Johnny Walker (CA) [1982] 1 WLR 1410
Donoghue v. Stevenson [1932] AC 562

For the plaintiff - Ng Chew; M/s. Choong Yik Son & Robiha
For the 2nd defendant - S. Jeya Palan (Tye Lee Moon with him); M/s. Maxwell, Kenion, Cowdy & Jones

JUDGMENT

Peh Swee Chin J:

The 1st defendant was a customer of the plaintiff/bank, in respect of money lent to the 1st defendant on the security of a charge executed by the 2nd defendant over a piece of mining land of the 2nd defendant. Further security for such money was provided by 2 letters of guarantee signed by the 2nd defendant and the 3rd defendant respectively subject to certain express limits stated in such letters of guarantee.

It is of immediate importance that I should forthwith deal with the statement of claim by which it would be clear without any doubt that the 2nd defendant was only sued in its capacity as a chargor of the mining land which it owned and not as a guarantor at all by virtue of the said letter of guarantee it had executed in addition to the said charge over the said mining land. That this omission to sue the 2nd defendant (hereinafter the chargor) *qua* guarantor was deliberate was further borne out, superfluously though, by the 3rd defendant having been sued as a guarantor. No one reading the statement of claim ought to be misled as to what the plaintiff wanted.

The plaintiff took out an O. 14 application against the chargor and succeeded in obtaining final judgment of the amount claimed. An appeal from the learned Registrar's decision in this connection was dismissed by me with costs, and now I give my grounds of decision.

The chargor took 2 points. The first point was that the liability was only limited to 60% of the overdraft facility or amount granted by the plaintiff to the 1st defendant, (secured also by the charge executed by the chargor,) i.e., RM39,600, which the chargor had agreed to pay to the plaintiff on demand in the letter of guarantee signed by the chargor also. For the purpose of this matter it would not be necessary to set out the letter of guarantee herein.

Learned Counsel for the chargor argued that it was clearly the intention that the liability of the chargor should be limited to RM39,600 and no more by virtue of the letter of guarantee, and because of such intention, the chargor's liability to repay the larger amount as spelt out in the annexure to the charge signed by the chargor was void and of no effect.

Learned Counsel for the plaintiff submitted that the plaintiff was enforcing the covenant to pay in the charge. To say there was a limit of 60% for the chargor would, it was submitted to the effect; contravene s. 92 of Evidence Act.

The argument of the chargor's Counsel was startling; he had clearly failed to appreciate that the letter of guarantee and the charge were separate transactions or documents which would give rise to separate and distinct causes of action. Nothing in the said charge documents between the chargor and the plaintiff had set any limit of repayment to RM39,600 or 60% of RM66,000, and in this connection these documents were signed on a date after the signing of the relevant letter of guarantee. On the contrary, in the charge documents, the chargor on demand agreed to pay the specified sum of RM60,000 with interest on monthly rests etc. The chargor and the plaintiff had so declared and bound themselves. No reference to charge (which was to be signed) was made in the letter of guarantee to the effect that the whatever the sum which the chargor agreed to repay in any subsequent charge to be signed, would be void unless that such sum was limited to RM39,600 and Counsel's argument was devoid of any merit at all.

The 2nd point raised by learned Counsel for plaintiff was specious, rather than one of substance. It was submitted that the mining lease in respect of the mining land that was charged by the chargor was for a period of 10 years, expiring on 23 June 1985. The plaintiff had filed the present action in 1987, i.e., 2 years after expiry date of the mining lease. It was further submitted that the mining lease could have been sold (i.e., before its expiry), and should not be allowed to expire, and that there was a duty of care owed to a guarantor and the chargor, and in support, the case of the *Standard Chartered Bank v. Johnny Walker* (CA) [1982] 1 WLR, 1410 was cited.

In reply learned Counsel for the plaintiff said that the case was distinguishable, and in the instant case, by virtue of Clause 28 of annexure to the charge, the chargee was given discretion to increase credit to the chargor or to determine it.

It would be clear that the chargor had tried persistently to embroil the plaintiff in the letter of guarantee but the plaintiff appeared resolute to have no part of it.

However, the chargor's Counsel mentioned that such duty of care was also owed to the chargor of the charge in the instant case. This Court could not bind itself to the point once it raised.

In *Standard Chartered Bank*, it was held that the receiver appointed pursuant to a debenture signed in favour of the bank, in realizing assets, had owed a duty of care to the guarantors in that case to obtain the best price and to choose the time to sell the assets in the circumstances permitted, and that the bank there would be attached with the receiver's action of the banks had interfered with the conduct of receivership. Lord Denning in that case made an *obiter dictum* that duty of care would also be owed by a mortgagee to a mortgagor to obtain in the circumstances the best possible price and exercise a reasonable degree of care in choosing the time, not to sell at the worst possible time.

By analogy the *obiter dictum* of Lord Denning to a mortgagee, in my view, should apply equally to a chargee who ought to owe such a similar duty of care in selling by public auction the charged land.

However, in the instant case, parties were not concerned with the sale of the mining lease in an auction ordered in foreclosure proceedings, and no question about the best possible price arose. Here the chargee had sued the chargor on a 'personal' covenant to pay. The time to sell, from the *dictum* of Lord Denning should mean the time in foreclosure proceedings after the Court has granted an order of sale by public auction. The *Standard Chartered Bank* case was not applicable strictly to the instant case.

However, in view of principle of neighbour-in-law of Lord Atkin of the *Donoghue v. Stevenson's* fame [1932] AC 562, following the reasoning of Lord Denning in the *Standard Chartered Bank*, in my view, the duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much as possible any surplus after sale of charged land. Then, the next question to me was whether the plaintiff as chargor had been guilty of any breach of such duty of care.

The Court took judicial notice of the fact that from its structure, the chargor was a financially powerful company, it was created and owned by the State Government of Perak. The fact was too well-known except to the most uninitiated in matters of commerce in Perak or any other State in Malaysia. The State Government has been the issuing or renewing authority of any mining lease in Perak. All these could have played a crucial role in the plaintiff granting the overdraft facility. To renew a mining lease which was to expire soon would obviously be for the benefit much more of the chargor than the chargee in view of personal covenant to pay and the fact judicially noticed by the Court. To sell the mining lease, not at the request of the chargor, would amount to the withdrawal of overdraft facility of which the borrower (1st defendant) was in dire need. All the circumstances indicated that the plaintiff as chargee had not been in breach of the duty of care explained above. I therefore found the 2nd point of the chargor to be of no substance.

It should not require a long and expensive trial to determine the points raised if they could be decided here and now. I therefore dismissed the appeal of the chargor, i.e., 2nd defendant with costs.

Also found at [1990] 1 CLJ 58